

Further, in applying this test, the Board recently explained that in weighing the factors, it does not simply mechanically count the number of factors favoring and disfavoring protection. Thus, the Board stressed that an equal balance of two factors on each side does not dictate a conclusion that the conduct has lost the act's protection *The Tampa Tribune*, 351 NLRB 1324, 1327, at fn. 19 (2007). In that case, the Board found that an employee's comment that the Employer's Vice President of Operations was a "stupid fucking moron" did not lose the protection of the act in the circumstances of that case. The Board found that one of the *Atlantic Steel* factors weighed "moderately" against protection and another weighed "slightly" against protection. But the Board found that two factors weighed in favor of protection and outweighed the other two factors. *Id.*

Respondent argues that the ALJ incorrectly applied the *Atlantic Steel* factors to the circumstances of the instant case (Resp. Br. at 31-38). With regard to the first factor, the place of the discussion, the ALJ found this factor weighed against protection. However, the ALJ implicitly accorded this factor comparatively slight weight in light of several mitigating factors: (1) Agins was not on duty at the time; (2) None of his comments were directed to any of his superiors; (3) it is more than likely that other instances of heated discussion or use of profanity had occurred in the portion of the facility which is open to the public (ALJD 48:17-25). Respondent's assertion in its brief (Resp. Br. at 35) that Agins' conduct undermined the company's ability to maintain order and discipline rings particularly hollow in the circumstances of the instant case. It was a unique situation which occurred only because Agins and the other union members were in the store to lend their support to Peter Montalbano in his wearing of a union button. Agins and Yablon, although employees of Starbucks, were in the store as customers.